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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-3236

FRANK REYNOLDS, Petitioner

v.

JUDGE JOSEPH W. WETLI, Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Sixth Circuit

Joseph L. Newman
740 Leader Building
Cleveland, Ohio 44114
Attorney for Petitioner

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FRANK REYNOLDS, Petitioner

-vs-

JUDGE JOSEPH L. WETLI

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on July 21, 1977.

OPINIONS BELOW

The opinions relevant to this petition were issued by the United District Court for the Northern District of Ohio, Western Division in Reynolds v. Wetli Civil No. 75-431 (N.D. Ohio, W. Div., March 31, 1977) and by the United States Court of Appeals in the Sixth Circuit in Reynolds v. Wetli No. 77-3236 (6th Cir. July 21, 1977 and September 30, 1977) all are reproduced and attached hereto at Appendix, pages i to vii .

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on July 21, 1977. A petition for Rehearing was denied on September 30, 1977. The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTIONS PRESENTED IN REVIEW

Whether criminal liability for possession of undersized fish can attach upon an owner of a boat solely because of that ownership?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the due process and equal protection clauses of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment. The statute under which the defendant was convicted was Ohio Rev. Code Sec. 1531.02 pursuant to the definition established by Ohio Rev. Code Sec. 1531.01 (H). The provisions are set forth at appendix, pages viii to x .

STATEMENT OF THE CASE

The ownership of the boat was stipulated by the defendant. The state proved that defendant was not on and had not been on the boat. The state further proved that some fish on the boat were undersized. The defendant was convicted of possession of the fish and sentenced to 10 days in jail and fined $750. Appeals were pursued through the state systems. After denial a Petition for Habeas Corpus was filed in the District Court. The District Court concluded

criminal liability under these circumstances was not a violative of due process but granted a certificate of probable cause while denying the writ. The Court of Appeals decided the question raised was one of fact and therefore not cognizable in federal habeas corpus and granted a Motion to Affirm.

REASONS FOR GRANTING THE WRIT

While the Court of Appeals decision is erroneous because the issue raised is not sufficiency of the evidence, the real difficulty is the denial of due process created by the District Court's decision. First of all to convict someone for possession because he was "any control of things referred to". Ohio Rev. Code Sec. 1531.01 (H) where the control is ownership of the boat on which the things were found not only fails to comport with the notice requirements of due process but is facially void for vagueness. Second, irrespective of the construction applied to State law, to convict one for possession of fish held by another is vicarious criminal liability for possession of non-contraband substances, a concept not supported by decisions of this or any other Court.

There is, moreover, an equal protection aspect to this case arising from the effect of Ohio decisional law. Ohio has already decided that the Statute is unconstitutional as applied to truck drivers of undersized fish Ohio v. Williams 94 Ohio. App. 249 (1952) and actual owners of undersized fish Ohio v. Euclid Fish Company 95 O.L.A. 1 (1964), if proof offered is only that of their control of the fish without actual knowledge. Thus, there is an irrational distinction among those having "any control".

CONCLUSION

The decision below represent a unique departure from the due process principles that one cannot be convicted of a crime committed by another, that one not be proven guilty because of one's status, and the knowledge of some element of the offense being committed is essential. This petition for writ of certiorari should therefore be granted.

Respectfully submitted,

/s/ Joseph L. Newman

Joseph L. Newman
740 Leader Building
Cleveland, Ohio 44114
Counsel for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for a Writ of Ceriorari was mailed to James J. Martin, Assistant Attorney General, Counsel for Department of Natural Resources, Fountain Square, Building C, Columbus, Ohio 43224 and to Tom Schlageter, Acting Prosecutor, City of Oregon, Oregon, Ohio, by certificate mail, postage prepaid, return receipt requested, this 29th day of December, 1977.

/s/ Joseph L. Newman

Joseph L. Newman

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-3236

FRANK REYNOLDS, Petitioner

v.

JUDGE JOSEPH W. WETLI, Respondent

Petition for a writ of Certiorari to the
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A P P E N D I X

ORDER OF THE COURT OF APPEALS
NO. 77-3236
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK REYNOLDS
Petitioner-Appellant

vs.

JUDGE JOSEPH L. WETLI
Respondent-Appellee

(Entered September 30, 1977)

Before WEICK, EDWARDS and CELEBREZEE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and it is hereby denied.

ORDER OF THE COURT OF APPEALS
NO. 77-3236
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK REYNOLDS
Petitioner-Appellant

vs.

JUDGE JOSEPH L. WETLI
Respondent-Appellee

(Entered July 21, 1977)

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

Upon consideration it is ORDERED that the motion to affirm the Order of the District Court denying petitioner-appellant's application for a writ of habeas corpus be and it is hereby

granted and the judgment is affirmed for the reasons stated by the District Judge in his opinion, the principal reason being that federal review by habeas corpus of a criminal conviction in a state court does not extend to the sufficiency of the evidence.

ORDER OF THE UNITED STATES DISTRICT COURT
NO. C 75-431
NORTHERN DISTRICT OF OHIO

FRANK REYNOLDS
Petitioner
vs.
JUDGE JOSEPH WETLI
Respondent

(Entered March 31, 1977)

This cause came to be heard on petitioner's motion for a certificate of probable cause to appeal this Court's denial of petitioner's application for a writ of habeas corpus, filed pursuant to Rule 22(b), Federal Rules of Appellate Procedure, and in compliance with 28 U.S.C. § 2253.

The history of this case is somewhat confused and requires explanation. On September 9, 1974, petitioner herein was tried and convicted of several violations of the wildlife statutes and regulations of the State of Ohio, including unlawful possession of undersized walleye in violation of Ohio Revised Code § 1531.02, and Ohio Division of Wildlife Rule, Chapter NRW-3 Rule 02,§A, 4. The evidence adduced at trial, viewed in the light most favorable to respondent, was essentially as follows.

Petitioner Reynolds at all times relevant hereto was a commercial fisherman licensed by the State of Ohio. Petitioner's fishing license listed the "Bayhawk" as one of the boats used in the petitioner's fishing operation.

On May 4, 1974, the Bayhawk was brought to dock at petitioner's fish house by Darryl Spence, skipper of the boat and an employee of the petitioner. Petitioner was not on the Bayhawk when it docked, but did arrive at the dock a short time later aboard the "Propagotor, another commercial fishing boat used by Reynolds.

When the Bayhawk docked it was promptly boarded by agents of the Ohio Division of Wildlife, who observed fish on the deck and also observed that the door to the cabin of the Bayhawk was locked. The agents requested that Spence unlock the cabin for their inspection, but he refused. Petitioner Reynolds then arrived at the dock and he also was asked to unlock the cabin. Reynolds likewise refused to do so.

The agents then secured a search warrant, broke into the cabin of the Bayhawk, and found eight-six (86) pounds of walleye, sixty percent (60%) of which were determined to be "undersized." After the fish were found Reynolds boarded the Bayhawk and replaced the broken lock. That was the first time the evidence showed Reynolds to have actually been on board the Bayhawk.

Based on this evidence, Reynolds was found guilty of Ohio Revised Code §1531.02, which makes unlawful the possession of wildlife except in accordance with the provisions of the Ohio Revised Code and the orders of the Division of Wildlife. Ohio Division of Wildlife Rule 02(A) makes unlawful the possession of "undersized" walleye. Ohio Revised Code §1531.02(E), denies "possession" to mean "both actual and constructive possession and

any control of things referred to."

The petitioner appealed to the Sixth District Court of Appeals of Ohio, which affirmed his conviction for unlawful possession of walleye,[1] stating that the "record reveals facts proving beyond reasonable doubt that defendant was guilty of both counts charging defendants with illegal possession of walleye." On petitioner's motion for reconsideration, the Ohio Court of Appeals adhered to its decision affirming petitioner's conviction and, in effect upheld, on the facts of this case, the imposition of criminal liability absent proof of guilty knowledge or scienter.

Petitioner's appeal to the Ohio Supreme Court was dismissed on the court's own motion for failure to present a substantial constitutional question.

Thereafter, petitioner filed his application for a writ of habeas corpus, alleging the following grounds:

> I. The petitioner('s) fifth amendment right, as protected by the fourteenth amendment, not to be deprived of life, liberty or property without due process of law was violated by petitioner('s) conviction for criminal conduct of another involving possession when no evidence demonstrated any possession or knowledge

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[1]The Ohio Court of Appeals did reverse the petitioner's conviction for interference with a game protector, in violation of Ohio Revised Code Sec. 1533.67, for the reason that no probative evidence was found in the record to support the conviction.

of the petitioner justifying said conviction.

II. The petitioner('s) fourth amendment right, as protected by the fourteenth amendment, to be protected against unreasonable search and seizure was violated by issuance of a search warrant authorizing a forcible search against a vessel owned by him when no probable cause was shown for said search.

Upon petitioner's motion, an Order staying execution of petitioner's sentence of incarceration pending final determination of the issue presented was entered.

Petitioner concedes that he is foreclosed from further asserting his Fourth and Fourteenth Amendments search and seizure claim by Stone v. Powell, 96 S.Ct. 3037 (1976). Therefore, only ground I above need be considered on petitioner's motion for a certificate of probable cause.

On its initial review of petitioner's application for a writ of habeas corpus, this Court read petitioner's first ground for relief to raise only a challenge to the weight and sufficiency of the evidence to establish petitioner's "possession" of the illegal walleye. The Court reviewed the trial transcript and determined that the record was not "totally devoid" of evidentiary support for petitioner's conviction, and accordingly denied the petitioner's application for a writ of habeas corpus on the grounds that petitioner had failed to state a claim cognizable in federal habeas corpus. For further discussion of this issue see Reynolds vs. Wetli, No. C 75-431 (N.D. Ohio, Nov. 24, 1975).

Following the Court's denial of petitioner's application for a writ of habeas corpus, petitioner filed a Notice of Appeal in the Sixth Circuit Court of Appeals. The Sixth Circuit dismissed petitioner's appeal for failure of the petitioner to apply to the district court for a certificate of probable cause as required by Rule 22, Federal Rules of Appellate Procedure and 28 U.S.C. Sec. 2253.

Thereafter, the petitioner filed the instant motion for a certificate of probable cause. In reviewing said motion it became clear to the Court that petitioner's first claim for relief was not merely a challenge to the sufficiency of the evidence, but rather included a challenge to the constitutionality of Ohio Revised Code Sec. 1531.02, as applied to him. Specifically, it is the petitioner's contention that Ohio Revised Code Sec. 1531.02, imposes strict liability and allows imposition of criminal sanctions absent a finding of scienter, or guilty knowledge, and therefore violates his rights under the Due Process Clause of the Fifth and Fourteenth Amendments. In the interest of judicial expediency, the Court determined that it was necessary to decide the merits of this issue before ruling on petitioner's motion for a certificate of probable cause, and therefore granted the respondent leave to submit a memorandum of law. The question has now been briefed by both parties and is before the Court for a determination.

Although the respondent contends that there is sufficient evidence in the record from which the "guilty knowledge" of the petitioner might be inferred, the Court will assume, arguendo, that the

challenged statute, as applied to the petitioned in this case, imposes strict criminal liability. It is now well established, however, that the mere fact that a statute imposes strict liability does not render the statute constitutionally invalid. Numberous decisions of the United States Supreme Court have recognized the authority of legislatures to enact statutory schemes defining a criminal certain conduct which does not include the element of guilty knowledge, provided such statutes are part of a regulatory scheme in furtherance of the public health, safety, and welfare. See generally United States v. Salint, 258 U.S. 250 (1922); United States v. Dotterweich 320 U.S. 277 (1943). And at least two judicial decisions have approved legislative enactments designed to conserve wildlife resources which omitted scienter as an element of criminal liability. See United States v. Jamra, 491 F. 2d 764 (4th Cir. 1974); United States v. Ireland, 493 F. 2d 1208 (4th Cir. 1973).

In light of this authority, this Court cannot find that the imposition of strict liability in the instant case violated petitioner's constitutional right to due process of law.[2] Therefore, the Court will adhere to its decision of March 25, 1976, denying petitioner's application for a writ of habeas corpus.

However, as the constitutional question posed by the petitioner's application for a writ of habeas corpus is neither insubstantial or frivolous, the Court will grant petitioner's application for a certificate of probable cause.

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[2]The Petitioner relies on the authority of State v. Williams, 94 Ohio App. 249 (Sandusky Co. 1952), and State v. Euclid Fish Company, 95 O.L.A. 1 (Ct. App. Cuyahoga Co. 1964). However, those cases expressly limited their holding to the facts presented, and were distinguished from the instant case by the Ohio Court of Appeals. See State v. Reynolds, C.A. No. 7620 (Ct. App. Lucas County, filed May 23, 1975). The question as to whether Ohio Revised Code § 1531.02, was intended to impose strict criminal liability is a matter of state statutory construction and is therefore not cognizable by this Court.

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life; liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE.

1531.01 Definitions; taking of quail and fox
As used in Chapters 1531. and 1533. of the Revised Code:

(H) "Possession" means both actual and constructive possession and any control o. things referred to.

1531.02 State ownership of wild animals

The ownership of and the title of all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state, which holds such title in trust for the benefit of all the people. Individual possession shall be obtained only in accordance with the Revised Code or division of wildlife orders. No person shall at any time of the year take in any manner or possess any number of quantity of wild animals, except such wild animals as the Revised Code or division orders permit to be taken, hunted, killed, or had in possession, and only at such time and place, and in such manner, as the Revised Code or division orders prescribe. No person shall buy, sell, or offer any part of wild animals for sale, or transport any part of wild animals except as permitted by the Revised Code or division orders. No person shall possess or transport a wild animal which has been taken unlawfully outside the state.

A person doing anything prohibited or neglecting to do anything required by Chapter 1531 or 1533. of the Revised Code, or contrary to any division order violates this section. A person who counsels, aids, shields, or harbors an offender under such sections or divisions order, or who knowingly shares in the proceeds of such violation, or receives or possesses any wild animal in violation of the Revised Code or division order violates this section. No person shall hunt a wild bird or wild quadruped on Sunday or use a rifle, at any time, in taking migratory game birds.